NO. 89-1609

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1989

THE PEOPLE OF THE TERRITORY OF GUAM,

Petitioners,

v.

IRVIN IBANEZ,
RAMON ALDAN CASTRO,
PEDRO V. DALMAL,
NORBERT BOTELHO,

Respondents.

RESPONDENT IRVIN IBANEZ'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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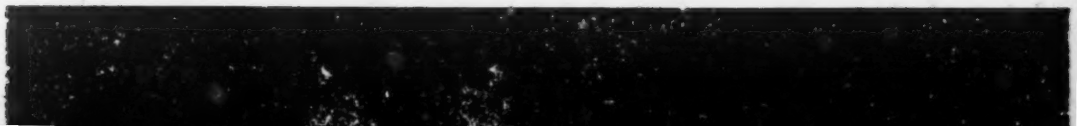

WHY THE CAUSE SHOULD NOT BE REVIEWED BY THE SUPREME COURT.

I. THIS CASE PRESENTS NO SPECIAL OR IMPORTANT REASONS JUSTIFYING REVIEW BY WRIT OF CERTIORARI.

Rule 17.1 by the Supreme Court Rules makes it clear that review by Writ of Certiorari "is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor". In subsections (a), (b), and (c) of Rule 17.1, this court has described the "character of reasons" that will be considered in determining whether a particular Petition for certiorari sets forth special and important reasons why the Court should exercise its discretion to hear a case:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Under Supreme Court Rule 54, the term "state court" does not include "territorial courts".

None of the three questions to which answers are sought in this court are of the kind which are appropriate for Supreme Court review.

II. THE REASONABLE DOUBT QUESTION

Petitioner's basic argument under this section of its Petition is that since states can constitutionally limit the right to appeal an erroneous jury instruction where no objection was interposed, the Ninth Circuit's so called "Scott exception" [United States v. Scott, 425 F.2d 55 (9th Cir. 1970)] is violative of Guam law. Contrary to Petitioner's contention, the two rules are not inconsistent. Moreover, the interplay between the two rules does not present a "federal question" within the meaning of Rule 17. Therefore, under Rule 17 of this Court's Rules, the Petition for Certiorari should be denied.

The decisions in each of Respondents' cases followed Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc) ("Yang II"); see also, Guam v. Yang, 800 F.2d 945 (9th Cir. 1986) ("Yang I"), Opinion withdrawn by 833 F.2d 1379 (9th Cir. 1987), reh. en banc in Yang II. In Yang II, the Ninth Circuit reversed a conviction where a reasonable doubt jury instruction was given which was dramatically different than Guam's statutory reasonable doubt jury instruction. 8 G.C.A. § 90.23(a) (1985); Yang II, 850 F.2d at 513. The Ninth Circuit in Yang II held that contemporaneous objection to a jury instruction is unnecessary when a "wall of binding authority squarely precludes the trial court from correcting an error in light of the objection". Yang II, 850 F.2d at 512, n.8.

Just as in Yang II, the juries in each of Respondents' trials were given a non-statutory reasonable doubt jury instruction. Respondent Irvin Ibanez faced the same wall of binding authority as did Yang. Respondent's trial was conducted before the same judge as Yang's.

Petitioner, however, claims the Ninth Circuit should not have applied the Scott exception because the "solid wall of authority" identified in Yang did not exist as the time of Respondent Irvin Ibanez's trial. Essentially, Petitioner wants Yang II reversed. If that is true, Petitioner should have sought review of that decision by certiorari, but it never did.

Petitioner argues that the wall of authority faced by Respondent at his trial, which was identical to the wall of authority in Yang II, was a wall thin enough to be successfully challenged. Petitioner says Judge Ferguson's "vigorous dissent" in Yang I was indicative of how thin the wall of authority really was. Additionally, Petitioner notes that "in Dec. 1987, the Ninth Circuit panel decision in Yang I was withdrawn (833 F.2d 1379), and a Petition for Rehearing was granted. After this point, that 'solid wall' simply did not exist". This may be true; however, Respondent Ibanez's trial took place in late 1986; the erroneous reasonable doubt instruction in his trial was given on October 16, 1986, and Petitioner's argument is seen to be factually specious. Similarly, Petitioner's contention that a "vigorous dissent" precluded application of the Scott exception is legally specious.

In Petitioner's view, trial counsel cannot simply ascertain the existence of a wall of authority; counsel must measure the width of the wall. By implication, a wall of authority two Ninth Circuit opinions thick qualifies for the Scott exception while a majority opinion with a "vigorous dissent" does not. The primary problem with Petitioner's argument is that it would lead to substantial uncertainty on the part of Defendants. Under Petitioner's proposed rule, trial counsel are forced to object to each and every ruling at trial, even when a wall of authority makes the objection frivolous, for fear that some day some court might indicate the wall was thinner than it seemed to be at the time.

As stated in Scott:

> Under these circumstances, were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on then-settled principles out of hope that those principles will be later overturned, or out of the fear that failure to object might subject counsel to a later charge of incompetence.

(425 F.2d at 57-58).

It is only by hindsight that trial counsel are able to tell just how thick a "solid wall of authority" was. By means of the same hindsight, Petitioner now seeks review by certiorari.

The Scott decision, as applied in Yang II, creates certainty and avoids the burden on trial courts created by repeated assaults on settled principles of law. Petitioner's new interpretation of Scott would be impossible to apply, except in hindsight, and would eviscerate a crucial and necessary exception to the requirement of contemporaneous objection.

Finally, Petitioner makes much of the fact that Respondent did not initially "request" the statutory jury instruction on reasonable doubt. (Petition at P. 13-14.) Petitioner exaggerates the significance of expressing a preference for a particular jury instruction. Under Guam law, unless the Scott exception applies, "no party may assign as error any portion of any instruction or omission therefrom unless he objects thereto, stating distinctly the matter to which he objects and the grounds for his objection." 8 G.C.A. § 90.19(c). The statute requires objection, not a stated preference. In Yang II, the Ninth Circuit held that an objection was unnecessary in light of the solid wall of authority which, at the time, endorsed the trial judge's predilection for the nonstatutory jury instruction. In a situation where an objection, which preserves an issue for appeal, is unnecessary, the expression

of a "preference" would most certainly be futile. Such a "preference" has no legal significance under Guam law or under the holding of Yang II.

III. THE HARMLESS ERROR ISSUE.

A. An Evidentiary Ruling Is Not A "Special and Important Reason" Which Justifies Supreme Court Review.

The erroneous admission of hearsay testimony at Respondent's trial is not an issue wherein "one federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter", nor is it one wherein "a federal court has decided a federal question in a way in conflict with a state court of last resort". [Supreme Court Rule 17.1(a)]. It is not one wherein a "state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals". [Supreme Court Rule 17.1(b)]. Finally, the question is not one wherein "a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in any way in conflict with applicable decisions of this Court". [Supreme Court Rule 17.1(c)]. Rather, the Ninth Circuit's ruling is one which Petitioner simply doesn't like. Indeed, it is ironic that the party who invited the error by insisting on the admission of the evidence at trial (over vigorous objection) is now the party seeking Supreme Court review on the grounds that the evidence was harmless.

B. A De Novo Review of the Harmless Error Issue Was Conducted.

Petitioner argues that the Ninth Circuit failed to follow its own concept of "de novo review" as described in Campbell v. U.S. Dist. Ct. for the N. Dist. of California, 501 F.2d 196, 206 (9th Cir. 1974). Campbell held that a court conducts a sufficient de novo review if it reads the questioned evidence before making its finding. Obviously, that is exactly what the Ninth Circuit did on Respondent's appeal. (See Petitioner's Appendix, P. 17(a)-20(a); P. 32(a)-33(a), f.n. 5).

IV. IT IS NOT ERROR FOR THE NINTH CIRCUIT CONDUCT A DE NOVO REVIEW OF DISTRICT COURT INTERPRETATIONS OF GUAM LAW.

Of the three questions of which review is sought, this is the least deserving of Supreme Court attention under the guidelines set forth in Supreme Court Rule 17. It is also the least meritorious.

Congress has expressly required that the relationship between Guam's local court and the federal courts be the same as that between state courts and federal courts. (48 U.S.C. §1424-2). In Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984) (en banc), no mention of which is made by Petitioner, the Ninth Circuit held that interpretations of state law by local district court judges should be reviewed de novo. In People v. Yang 850 F.2d. 507, 510 (9th Cir. 1988), the Ninth Circuit held that the statutory scheme establishing Guam's court system and the reasoning of its decision in Matter of McLinn compelled the adoption of a de novo standard of review for determinations of Guam law by the Appellate Division of District Court of Guam. In so doing, the Ninth Circuit noted that use of the de novo standard would be consistent with the Third

Circuit's treatment of a similar system of courts in the Virgin Islands. [See Saludes v. Ramos, 744 F.2d 992 (3rd Cir. 1984)]. Despite the clarity and logical necessity of this holding, Petitioner seeks to obfuscate the issue by citing a series of Ninth Circuit cases at Page 26-27 of its Petition which formerly stood for the proposition that deference must be given to Guam court interpretations of Guam law. Each of these cases was decided before Matter of McLinn and Yang II, and those decisions are no longer the law. Petitioner never sought review by certiorari of Yang II. It is only now, when faced with the unhappy prospect of a spate of retrials, that it seeks such review. Petitioner was content with the de novo standard until it worked to its disadvantage, and it should not be heard to complain now.

V. CONCLUSION.

None of the issues presented in the Petition for Certiorari are worthy of Supreme Court review. Additionally, each is factually and legally without merit. For the foregoing reasons, Respondent Irvin Ibanez respectfully requests that the Petition for a Writ of Certiorari be denied as to all Respondents herein, and in particular that it be denied on the grounds peculiar to him, as set forth in Section III hereof.

/s/ Irvin Ibanez 3/14/90

IRVIN IBANEZ, Respondent

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NO. 89-1609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PEOPLE OF THE TERRITORY OF GUAM, Petitioner, vs. IRVIN IBANEZ, RAMON ALDAN CASTRO, PEDRO V. DALMAL, NORBERT BOTELHO, Respondents.	AFFIDAVIT OF MAILING

I, David A. Mair, Esq., having first been duly sworn, do hereby depose and state:

1. That I am a member of the bar of this Court, although I have no relationship with and do not represent any of the parties involved in this proceeding;

2. That Respondent Irvin Ibanez's Brief in Opposition to Petition for Certiorari in this case and his Motion for Leave to Proceed In Forma Pauperis were deposited in a United Sates mailbox, first class postage prepaid, addressed to the Clerk of this Court, on the 14th day of May, 1990; and

Further, your affiant sayeth not.

By: _____
DAVID A. MAIR, ESQ.

SUBSCRIBED AND SWORN to before me the date written above.

BY: _____
Notary Public

MARY A. CRUZ
NOTARY PUBLIC
In and for the Territory of Guam
My Commission Expires: July 10, 1993

TLR/tab
F# 3720
D# 73720.015

NO. 89-1609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

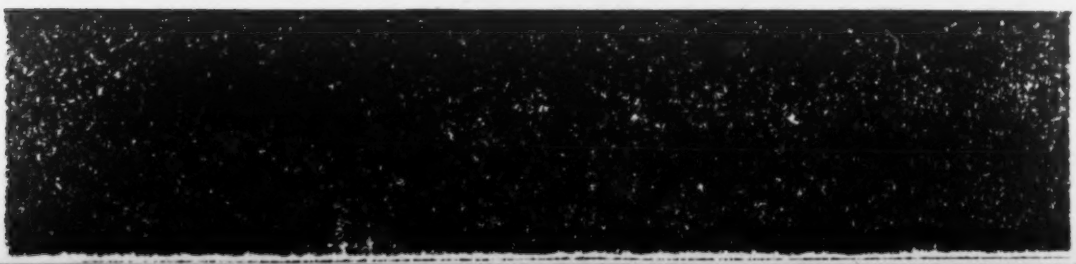
PEOPLE OF THE TERRITORY OF GUAM, Petitioner, vs. IRVIN IBANEZ, RAMON ALDAN CASTRO, PEDRO V. DALMAL, NORBERT BOTELHO, Respondents.	**AFFIDAVIT OF SERVICE**

TERRITORY OF GUAM)
) ss:
City of Agana)

I, Thomas L. Roberts, Esq., having represented Respondent Irvin Ibanez before the Appellate Division of the District Court of Guam and before the Ninth Circuit Court of Appeals, but having not yet been admitted to practice before the United States Supreme Court, after being duly sworn, do hereby depose and state upon my oath:

1. That on Monday, May 14, 1990, I caused Respondent's Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition to the Government of Guam's Petition for Writ of Certiorari in the above-captioned case to be delivered to the Office of the Attorney General, Prosecution Division, Suite 212A, Julale Center, Agana, Guam 96910, counsel for Petitioner;

2. That I caused the same documents to be served upon counsel for Ramon Aldan Castro by hand delivery to the law offices of Robert Hartsock, Esq., at his office located at Suite 301, GMLP Building, 230 West Soledad Avenue, Agana, Guam;



3. That I caused the same documents to be served upon David Terlaje, counsel for Pedro V. Dalmal, by hand delivery to his office at Suite 215, Union Bank Building, 194 Hernan Cortes Avenue, Agana, Guam 96910;

4. That I caused the same documents to be served upon Howard Trapp, counsel for Norbert Botelho, by hand delivery to his office at Howard Trapp Incorporated, 200 Saylor Building, 139 Chalan Santo Papa, Agana, Guam 96910; and

Further, your affiant sayeth naught.

Dated this 14th day of May, 1990.

THOMAS L. ROBERTS, ESQ.

SUBSCRIBED AND SWORN to before me the date above written.

By: _____
Notary Public

VELMA S. MENDOZA
NOTARY PUBLIC IN AND FOR
THE TERRITORY OF GUAM
MY COMMISSION EXPIRES
MARCH 27, 1993

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